(10)

No. 92-74

In the Supreme Court of the United States

OCTOBER TERM, 1992

DEPARTMENT OF REVENUE OF THE STATE OF OREGON, RICHARD A. MUNN, in his Capacity as Director of the Department of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN TRANSPORTATION CORPORATION; GENERAL ELECTRIC RAILCAR SERVICES CORPORATION; PULLMAN LEASING COMPANY; RAILBOX COMPANY; RAILGON COMPANY; TRAILER TRAIN COMPANY; UNION TANK CAR COMPANY,

Respondents.

On Writ of Certiorari to the Ninth Circuit Court of Appeals

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED July 7, 1992
CERTIORARI GRANTED May 17, 1993

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The following opinions have been omitted in printing this appendix because they appear on the following pages of the printed petition for certiorari:

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Oct. 6, 1988—Verified Complaint for Injunctive and Declaratory Relief.

Dec 15, 1988—Defendants' Answer.

Aug. 18, 1989—Stipulation of Facts filed with the United States District Court.

Jan. 22, 1990—Order and Judgment of the United States District Court.

Feb. 5, 1990—Plaintiffs' Motion to Amend the Court's Findings of Facts, to Make Additional Findings of Fact, and to Amend Judgment Accordingly under Rule 52(b); and Motion to Alter or Amend Judgment under Rule 59(e).

Apr. 20, 1990—Opinion and Order of the United States District Court denying motion to alter or amend judgment.

May 9, 1990—Plaintiffs' Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

Oct. 9, 1991—Opinion of the United States Court of Appeals for the Ninth Circuit [withdrawn].

Oct. 22, 1991—Defendants' Petition for Rehearing.

Apr. 8, 1992—Opinion of the United States Court of Appeals for the Ninth Circuit.

July 7, 1992—Defendant's Petition for Writ of Certiorari.

May 17, 1993—Certiorari granted.

VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
[List of attorneys omitted in printing]

ACF INDUSTRIES INCORPORATION, GENERAL AMERICAN TRANSPORTATION CORPORATION, GENERAL ELECTRIC RAILCAR SERVICES CORPORATION, PULLMAN LEASING COMPANY, RAILBOX COMPANY, RAILGON COMPANY, TRAILER TRAIN COMPANY, and UNION TANK CAR COMPANY,	)	Civil No. 88-1169PA VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF (State Ad Valorem Tax Discrimination)
Plaintiffs,	)	
vs.	)	
DEPARTMENT OF REVENUE OF THE STATE OF OREGON, and RICHARD A. MUNN, in his capacity as Director of the Department of Revenue of the State of Oregon,	)	
Defendants.	)	

I. This is a civil action seeking to restrain and enjoin defendants, and those in active concern and participation with them, from levying or collecting certain ad valorem taxes from plaintiffs ACF Industries, Incorporated; General American Transportation Corporation; General Electric Railcar Services Corporation; Pullman Leasing Company; Railbox Company; Railgon Company; Trailer Train Company; and Union Tank Car Company, for the 1988 tax year to the extent that such taxes are discriminatory and unlawful under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976), now codified as 49 U.S.C. §11503 and referred to therein as "Section 306." Plaintiffs also seek a declaratory judgment pursuant to 28 U.S.C. §2201 that defendants' assessments of plaintiffs' personal property for the 1988 tax year, and the levy and collection of ad valorem taxes based upon such assessments, violate Section 306.

JURISDICTION

2. Jurisdiction of this Court is based upon the following grounds:

a. Section 306(2) which confers jurisdiction upon district courts of the United States (notwithstanding 28 U.S.C. §1341 and without regard to amount in controversy or citizenship of the parties) to prevent a state, subsection of a state, or any authority action for a state or subdivision of a state, from levying or collecting ad valorem taxes that result in discriminatory treatment of common carriers by railroad;

b. 28 U.S.C. §1337 (as more fully appears herein, this action arises under an act of Congress regulating commerce); and

c. 28 U.S.C. §1331 [as more fully appears herein, this action arises under the United States Constitution, Article I, §8, cl. 3 (commerce clause) and presents a federal question].

VENUE

3. The defendants reside in this district, and the claims arise in this district, and proper venue is in this Court under 28 U.S.C. §139(b).

PARTIES

4. Plaintiff, ACF Industries Incorporated ("ACF"), is a New Jersey corporation with its principal offices located in the State of Missouri.

5. Plaintiff, General American Transportation Corporation ("TAGC"), is a New York corporation with its principal offices located in the State of Illinois.

6. Plaintiff, General Electric Railcar Services Corporation ("GERSCO"), is a Delaware corporation with its principal offices located in Chicago, Illinois.

7. Plaintiff, Pullman Leasing Company ("Pullman"), is a division of Signal Capital Corporation, a Delaware corporation with its principal offices located in Chicago, Illinois.

8. Plaintiff, Railbox Company ("Railbox"), is a Delaware corporation with its principal offices in Chicago, Illinois.

9. Plaintiff, Railgon Company ("Railgon"), is a Delaware corporation with its principal offices in Chicago, Illinois.

10. Plaintiff, Trailer Train Company, is a Delaware corporation with its principal offices in Chicago, Illinois.

11. Plaintiff, Union Tank Car Company ("Union Tank"), is a Delaware corporation with its principal offices located in the State of Illinois.

12. Common carriers by rail are required by 49 U.S.C. §11121 to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service. Some common carriers do not directly purchase all of the necessary rolling stock, particularly specialty cars such as tank, hopper and refrigerator cars.

13. Plaintiffs furnish railroad cars for use by common carriers by railroad by leasing railroad cars either to shippers or

directly to railroads and are commonly referred to as private carline companies.

14. Private carline rolling stock, which is leased to shippers or common carriers by railroad and which is used by common carriers by railroad, is "transportation property" under Section 306. All of the plaintiffs' property involved in this action is "transportation property" under Section 306.

15. Defendant, the Department of Revenue of the State of Oregon ("DOR"), is an agency of the State of Oregon, and under ORS 306.115 the DOR exercises general supervision and control over the system of property taxation throughout the State of Oregon. The DOR maintains its principal office in Salem, Oregon.

16. Defendant, Richard A. Munn, is the Director of the Department of Revenue of the State of Oregon ("Director"). Under ORS 305.015, the administration of the revenue and tax laws of the State of Oregon are invested in the DOR and the Director. The Director maintains his principal office in Salem, Oregon.

17. The defendants are responsible for the valuation and assessment of taxes on the property of the plaintiffs within the State of Oregon.

AD VALOREM TAXATION IN OREGON

18. Under ORS 308.250, all tangible personal property in the state, except that which is expressly exempt, shall be subject to taxation and shall be valued at its "true cash value." Such true cash value shall be taken and considered as the taxable value on which the levy shall be made.

19. Under ORS 308.505 *et seq.*, the tangible personal property of each car company owning or operating any railroad cars in the State of Oregon, including the plaintiffs, is valued and

assessed for ad valorem tax purposes by the defendants. The assessed values are apportioned to the various counties within the State of Oregon, and the counties apply a tax levy and collect the taxes.

20. No less than a third of the plaintiffs' 1988 ad valorem taxes are payable on or before November 15, 1988.

21. Under ORS 307.040 *et seq.*, the following types of personal property, among others, are expressly exempt from ad valorem taxes; agricultural machinery and equipment (ORS 307.400); business inventories (ORS 307.400); livestock, poultry, bees, and fur-bearing animals (ORS 307.400); and agricultural products in possession of farms (ORS 307.325).

22. In addition, significant amounts of other commercial and industrial personal property, including nonagricultural machinery and equipment, is in effect exempt from taxation because of underreporting and undervaluation.

SECTION 306

23. Section 306 declares that discriminatory state taxation of rail transportation property or state taxation that results in discrimination against a common carrier by railroad subject to the jurisdiction of the Interstate Commerce Commission constitutes an unreasonable and unjust discrimination against, and an undue burden upon, interstate commerce. Section 306, a copy of which is attached, states in part:

> It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> (b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).
>
> (c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

24. Section 306 defines "transportation property" to mean "transportation property, as defined in the regulations of the [Interstate Commerce] Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation."

25. Section 306 defines "commercial and industrial property" to mean "all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use which is subject to a property tax levy."

26. Section 306 was enacted on February 5, 1976, and, by its terms, became effective February 5, 1979. The purpose of delaying the effective date of Section 306 for a period of three years after its enactment was to give states an opportunity to conform their assessment laws and practices to the requirements of Section 306.

FIRST CAUSE OF ACTION

27. Plaintiffs incorporate herein the allegations made in Paragraphs 1 through 26, above, and further allege as follows.

28. Oregon's property taxation scheme, as described above, exempts most tangible personal property from taxation.

29. In addition, other tangible personal property, while nominally taxable, is not taxed due to underreporting and undervaluation.

30. As a result, approximately 80% of the aggregate value of tangible personal property in Oregon is not taxed.

31. Plaintiffs' tangible personal property is not entitled to the exemption afforded to other commercial and industrial personal property under Oregon law, and will all be taxed for the 1988 tax year at no less than its true market value.

32. Section 306(1)(d) prohibits the imposition of any tax which results in discriminatory treatment of a common carrier by railroad.

33. Tax discrimination against the rail transportation property of car companies, including plaintiffs, results in discriminatory treatment of common carriers by railroad, therefore the imposition of any personal property tax on plaintiffs, when the personal property of other taxpayers in Oregon is not taxed, violates Section 306(1)(d).

SECOND CAUSE OF ACTION

34. Plaintiffs incorporate herein the allegations made in Paragraphs 1 through 26, above, and allege alternatively as follows.

35. Approximately 80% of the aggregate value of tangible personal property in Oregon is not taxed.

36. All of plaintiffs' tangible personal property is taxed in Oregon on the basis of no less than its true market value.

37. Because 80% of the aggregate value of personal property in Oregon is not taxed, no more than 20% of the value of plaintiffs' personal property should be taxed.

38. Discriminatory taxation such as this against the rail transportation property of car companies, including plaintiffs, results in discriminatory treatment of common carriers by railroad, and therefore violates Section 306(1)(d).

WHEREFORE, plaintiffs request that judgment be entered in their favor and against defendants, and that this Court grant plaintiffs declaratory and injunctive relief providing that:

(a) The assessment of plaintiffs' personal property, and the imposition, levy, or collection of any property taxes against plaintiffs' personal property pursuant to Oregon law violates Section 306(1)(d), and that the imposition, levy, or collection of the tax from plaintiffs be preliminarily and permanently enjoined;

or

(b) The assessment of plaintiffs' personal property, and the imposition, levy, or collection of any property tax based on more than 20% of the value of plaintiffs' personal property violates Section 306(1)(d), and that the imposition, levy, or collection of a tax on more than 20% of the value of plaintiffs' personal property from plaintiffs be preliminarily and permanently enjoined;

(c) That the Court award to plaintiffs their costs and such other and further relief as this Court deems just and proper.

[Names of counsel and signature omitted in printing]

VERIFICATION

I, Alan Rusin, do hereby declare that I am the Director of Taxes for GATX Corporation, and I further declare that the facts stated in the foregoing complaint are true to the best of my knowledge and belief.

[Signature and certification omitted in printing]

STIPULATION OF FACTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
[List of attorneys omitted in printing]

ACF INDUSTRIES INCORPORATION, GENERAL AMERICAN TRANSPORTATION CORPORATION, GENERAL ELECTRIC RAILCAR SERVICES CORPORATION, PULLMAN LEASING COMPANY, RAILBOX COMPANY, RAILGON COMPANY, TRAILER TRAIN COMPANY, and UNION TANK CAR COMPANY,	)	
Plaintiffs,	)	Civil No. 88-1169PA
vs.	)	STIPULATION OF FACTS
DEPARTMENT OF REVENUE OF THE STATE OF OREGON, and RICHARD A. MUNN, in his capacity as Director of the Department of Revenue of the State of Oregon,	)	
Defendants.	)	

The parties agree that the following facts are true and require no proof:

1. These stipulations are made for the sole purpose of permitting the Court to decide the issues presented in this case. They shall not be binding on any party or considered admissions for any other purpose or in any other action or proceeding.

2. The parties agree and stipulate that the Court may, for purposes of deciding this litigation, accept stipulated facts as true. However, the parties do not waive their right to object to the relevancy of any facts stipulated herein, or to argue as to the relevancy of any of these facts.

SECTION 306

3. 49 U.S.C. §11503 was originally enacted as Section 306 of Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976) ("Section 306"), the Railroad Revitalization and Regulatory Reform Act of 1976. 49 U.S.C. §11503 was published as part of Pub. L. No. 95-473, 92 Stat. 1337, which was "an act to revise, codify and enact without substantive change the Interstate Commerce Act and related laws as subtitle IV, Title 49, United States Code transportation." Section 3(a) of Pub. L. No. 95-473, 92 Stat. 1446, also provides that the statutory language of 49 U.S.C. §11503 cannot be construed as making a substantive change to Pub. L. No. 94-210. A copy of Section 306 is attached as Exhibit "A" to the Complaint, and the parties stipulate that the provisions of Section 306 control.

4. Section 306 was enacted on February 5, 1976, but it did not become effective until February of 1979. All taxes involved in this lawsuit were assessed after the effective date of the Act.

THE PARTIES

5. Plaintiffs ACF Industries Incorporated, General American Transportation Corporation, General Electric Rail Car Services Corporation, Pullman Leasing Company, Railbox Company, Railgon Company, Trailer Train Company, and Union Tank Car Company all furnish railroad cars for use by common carriers by railroad by leasing railroad care either to shippers or directly to railroads. The plaintiffs are commonly referred to as "private carline companies."

6. The following chart depicts, for each plaintiff, the percentage of its fleet leased to shippers and to railroads:

	Leased to Shippers	Leased to Railroads
ACF	97%	3%
GATX	99%	1%
GERSCO	77%	23%
Pullman	64%	36%
Railbox	0%	100%
Railgon	0%	100%
Trailer Train	.001%	99.999%
Union	99%	1%

7. Common carriers by railroad are required by 49 U.S.C. §11121 to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service. Some common carriers do not directly purchase all of the necessary rolling stock, particularly specialty cars such as tank, hopper, and intermodal cars.

8. The private carline industry provides cars which are used by railroads to provide their transportation service. For example, Union Tank, General American Transportation Corporation, and ACF Industries own 103,741 tank cars which comprise 56% of the nation's tank car fleet. As a result, railroads do not have to expend the capital to acquire or to maintain these cars.

9. Plaintiffs ACF Industries Incorporated, General American Transportation Corporation, General Electric Railcar Services Corporation, Pullman Leasing Company, and Union Tank Car Company are private car companies engaged in the business of leasing railcars to railroads and/or shippers. The rolling stock of these private car companies is used by common carriers by railroad to provide rail transportation services to shippers. Under 49 U.S.C. §11122, the Interstate Commerce Commission (ICC)

is authorized to regulate the lease agreements between these carlines and the shippers. The ICC is also authorized to regulate the tariffs that shippers pay to railroads and that railroads pay to the private car companies.

10. With respect to the carlines referred to in Paragraph 9, the private carline company normally leases railroad cars to a shipper on a periodic basis. The shipper in turn provides the car to the railroad and the railroad is paid a full freight charge for shipping goods using the car. The railroad pays the private carline company for the use of the car, which payment is in turn credited by the private carline company against the shipper's lease obligation.

11. None of the named plaintiffs (other than Trailer Train, Railbox, and Railgon) operates under a formal car pooling arrangement pursuant to 49 U.S.C. §11342. *See*, Exhibit A. pp. 875–877 for a description of a pooling arrangement. Some of the plaintiffs, however, have arrangements with common carriers by railroad under which their cars are used by (and are earmarked for return to) specific common carriers by railroad.

12. Trailer Train was incorporated in Delaware on November 9, 1955. As of January 1, 1988, its stockholders consisted entirely of operating railroads. Trailer Train was organized by the owner-railroads to meet the demand for a nationwide fleet of "piggy back" flatcars. Such flatcars carry truck trailers and are referred to as trailer-on-flatcar (TOFC) cars. Operations began in 1956 with a fleet of 500 cars. Trailer Train now owns both TOFC cars and other kinds of flatcars.

13. Railbox was organized as a wholly-owned subsidiary of Trailer Train on January 3, 1974, in an effort to remedy chronic boxcar shortages through the use of a "Pool" of standard-design, wide-door boxcars of general usefulness. Railbox is a separate

corporate entity from Trainer [*sic*] Train. Railbox made an initial acquisition of 10,000 cars from its own resources and with the assistance of certain railroads.

14. Railgon was organized as a wholly-owned subsidiary of Trailer Train on June 20, 1979, in response to requests from the railroad industry for a pool of new, standardized, heavy-duty, free-running gondola cars. Such cars are used primarily to haul steel products and scrap. Railgon is a separate corporate entity from Trailer Train.

15. In February 1974, Trailer Train and Railbox, along with 28 common carriers by rail, sought approval from the Interstate Commerce Commission under Section 5(1) of the Interstate Commerce Act for the pooling of car services. On August 1, 1974, the Commission issued an order which approved in the public interest pooling agreements for both boxcars and flatcars for Railbox and Trainer [*sic*] Train, respectively and which allowed a division of service and a division of earnings. The principal purposes of the pooling agreement were: to standardize car types for improved utility and economy; to coordinate research, information and development; to obtain better car management at a lower cost; and to improve rail service to the public. *See*, *American Railbox Company and Trailer Train Company; et al., For Approval of The Pooling of Car Service With Respect to Boxcars*, 347 ICC 862 (1974), a copy of which is attached as Exhibit A hereto.

16. On July 14, 1987, Trailer Train and all participants in the pooling agreement filed an application with the ICC for an extension of the pooling agreement and Form A car contract. On February 17, 1989, the ICC approved and authorized the extension of the pooling for a period of five years from October 1, 1989.

17. The order of the Interstate Commerce Commission which approved the Trailer Train and Railbox pools indicated that, while both companies would be exempt from most regulations by the Commission, the companies would be subject to emergency car service directives (as are common carriers by railroad), would be required to file all rate changes with the Commission (subject to rejection by the Commission upon complaint or upon its own motion), and would be prevented from paying any dividends or rebates to carrier participants without prior approval of the Commission.

18. A similar pooling agreement, with reference to gondola cars owned by Railgon, was approved by the Commission on March 7, 1980.

19. Under the car contracts by which the cars of Trailer Train, Railbox, and Railgon are provided to common carriers by railroad, all state taxes are paid by the carlines as expenses of operation, and such expenses are passed on to common carriers by railroad by means of the user charges which take into account all expenses, including expenses for state taxes. The basic terms of such contracts are approved by the Interstate Commerce Commission.

20. The essential relationships among Trailer Train, Railbox, Railgon and common carriers by railroad as set forth in Exhibit A have not changed materially since the date of that report.

21. On December 13, 1978, the Interstate Commerce Commission defined "transportation property" for purposes of Section 306 in ICC Document No. 36873 (a copy of which is attached hereto as Exhibit B). The Commission's definition of transportation property specifically includes rail cars held under pooling agreements, or used, but not owned, by railroads.

22. Private carline rolling stock, which is leased to shippers or common carriers by railroad and which is used by common carriers by railroad, is therefore "transportation property" under Section 306. All of the plaintiffs' property involved in this action is "transportation property" under Section 306.

23. Defendant, the Department of Revenue of the State of Oregon (DOR), is an agency of the State of Oregon, and under ORS 306.115, the DOR exercises general supervision and control over the system of property taxation throughout the State of Oregon. The DOR maintains its principal office in Salem, Oregon.

24. Defendant, Richard A. Munn, is the Director of the Department of Revenue of the State of Oregon (Director). Under ORS 305.015, the administration of the revenue and tax laws of the State of Oregon are vested in the DOR and the Director. The Director maintains his principal office in Salem, Oregon.

25. The defendants are responsible for the valuation and assessment of taxes on the property of the plaintiffs within the State of Oregon.

PROPERTY TAXATION IN OREGON

26. ORS 308.250 requires all tangible personal property in the State, except that which is expressly exempt, to be subject to taxation and to be valued at its "true cash value." Such true cash value shall be taken and considered as a taxable value on which the levy shall be made.

27. Under ORS 307.040 *et seq.*, the following types of personal property, among others, are expressly exempt from ad valorem taxes: agricultural machinery and equipment (ORS 307.400); business inventories (ORS 307.400); livestock, poultry, bees, and fur-bearing animals (ORS 307.400); and agricultural products in possession of farms (ORS 307.325).

28. In addition the following types of property are not subject to ad valorem taxes because they are subject to registration fees or severance taxes: motor vehicles (ORS 803.585) and standing timber (ORS 321.272, 321.420).

29. Plaintiffs' tangible personal property was assessed and taxed for the 1988 tax year at no less than its true cash value.

30. The total amount of locally appraised personal property which was taxed in Oregon, as of January 1, 1988, was $3.6 billion.

31. As of January 1, 1988, the estimated market value of centrally-assessed, non-railroad utility personal property which was taxed in Oregon is $1.2 billion.

32. As of January 1, 1988, the estimated market value of farm machinery and equipment (excluding motor vehicles) and livestock in Oregon which is exempt from tax is $1.4 billion.

33. As of January 1, 1988, the estimated market value of non-farm business inventory in Oregon which is exempt from tax is $6.8 billion.

34. As of January 1, 1988, the estimated market value of agricultural, commercial, and industrial motor vehicles is $1.5 billion.

35. As of January 1, 1988, the estimated market value of non-exempt non-farm business machinery, equipment, and furniture and fixtures (excluding utilities and motor vehicles) is $8.0 billion.

36. As of January 1, 1988, the estimated market value of all farm and non-farm business tangible personal property (including utilities and motor vehicles) is $18.9 billion, and $17.4 billion excluding motor vehicles.

37. As of January 1, 1988, the percentage of commercial and industrial tangible personal property which is not taxed (by

reason of exemption, undervaluation, and underreporting) in Oregon is approximately 75%, if motor vehicles are included.

38. As of January 18, 1988, the percentage of commercial and industrial tangible personal property which is not taxed (by reason of exemption, undervaluation, and underreporting) in Oregon is approximately 72%, exclusive of motor vehicles.

39. For the tax year 1988, the estimated market value of standing timber is $11.6 billion.

40. For the tax year 1988–89, the total receipts of timber severance taxes collected pursuant to ORS 321.257, 321.405 and 321.005 were $26.4 million.

41. Defendants published a report which, among other things, indicated an estimated market value in Oregon of $65.0 billion, for intangible personal property, as of January 1, 1986. The parties have no specific factual information as to what portion of the total intangible personal property is commercial and industrial property.

42. The average *ad valorem* tax rate in Oregon for the 1988 tax year is 2.489%.

43. As of January 1, 1988, an estimated $4.4 billion in value of non-exempt commercial and industrial tangible personal property was not taxed due to "undervaluation" or "underreporting." The parties estimate that, of the $4.4 billion, $2.8 billion is attributable to undervaluation, and $1.6 billion is due to underreporting.

44. For the tax year 1988–89, the estimated market value of centrally-assessed non-railroad utility real property is $4.8 billion.

45. For the tax year 1988–89, the estimated market value of locally-assessed commercial and industrial real property (excluding utilities) is $19.9 billion.

46. For the tax year 1988–89, the estimated market value of commercial and industrial real property (including utilities) is $24.7 billion.

Dated this 18th day of August, 1989.

[Signatures omitted in printing]

[Exhibits omitted in printing]

PLAINTIFFS' MOTION TO AMEND COURT'S FINDINGS OF FACT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Names of Counsel omitted in printing]

ACF INDUSTRIES INCORPORATION, GENERAL AMERICAN TRANSPORTATION CORPORATION, GENERAL ELECTRIC RAILCAR SERVICES CORPORATION, PULLMAN LEASING COMPANY, RAILBOX COMPANY, RAILGON COMPANY, TRAILER TRAIN COMPANY, and UNION TANK CAR COMPANY,	) Civil No. 88-1169PA) PLAINTIFFS' MOTION TO AMEND THE COURT'S FINDINGS OF FACTS, TO MAKE ADDITIONAL FINDINGS OF FACT, AND TO AMEND JUDGMENT ACCORDINGLY UNDER RULE 52(b); AND MOTION TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e)
Plaintiffs,	
vs.	
DEPARTMENT OF REVENUE OF THE STATE OF OREGON, and RICHARD A. MUNN, in his capacity as Director of the Department of Revenue of the State of Oregon,	
Defendants.	

(Oral Argument Requested)

Pursuant to Rules 52(b) and 59(3) of the Federal Rules of Civil Procedure, the plaintiffs move this Court to amend the Court's findings and conclusions, to make additional findings and conclusions, and to amend judgment accordingly, and to alter and

amend its Order and Opinion filed on January 23, 1990, in the following respects:

1. To modify explicit or implicit findings of the Court which are inconsistent in the following particulars with the Stipulations of Facts which constitutes the record;

(a) The finding that standing timber should be considered as, or compared to, personal property, is contrary to Paragraphs 37 and 38 of the Stipulation. To be consistent with the Stipulation the Court should have found that timber is not properly part of the comparison class in this case;

(b) The finding that timber is subject to an ad valorem property tax is contrary to Paragraph 28 of the Stipulation. To be consistent with Stipulation the Court should have found that timber is not subject to *ad valorem* property tax;

(c) the finding that the percentage of personal property which is exempt is no more than 38.2% is contrary to Paragraphs 37 and 38 of the Stipulation. To be consistent with the Stipulation the Court should have found that 67% of personal property in Oregon was exempt;

(d) the finding that the plaintiffs failed to demonstrate that their personal property was valued at full cash value is contrary to Paragraph 29 of the Stipulation. To be consistent with the Stipulation the Court should have found that the plaintiffs' personal property is assessed and taxed "at no less than its true cash value."

2. To correct the Court's statement that the plaintiffs' claim rested on the argument that Oregon's exemption of standing timber from ad valorem property tax violates Section 306(1)(d), and to modify the Court's implicit finding that standing timber is part of the comparison class of *personal* property to be consider-

ed in this case, and instead to exclude timber from the comparison class considered.

3. To clarify whether the "comparison class" of personal property under Section 306(1)(d) does or does not include motor vehicles.

4. To grant, based on the foregoing, the relief originally requested by the plaintiffs in their Complaint.

This motion is based on the pleadings, Stipulation of Facts, and Memoranda of Law already on file, and the attached Memorandum of Law.

[Signatures and certification omitted in printing]

UNITED STATES DISTRICT COURT OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
[Names of Counsel omitted in printing]

ACF INDUSTRIES INCORPORATION, GENERAL AMERICAN TRANSPORTATION CORPORATION, GENERAL ELECTRIC RAILCAR SERVICES CORPORATION, PULLMAN LEASING COMPANY, RAILBOX COMPANY, RAILGON COMPANY, TRAILER TRAIN COMPANY, and UNION TANK CAR COMPANY,	)	CV No. 88-1169-PA
Plaintiffs,	)	OPINION
v.	)	
DEPARTMENT OF REVENUE OF THE STATE OF OREGON, and RICHARD A. MUNN, in his capacity as Director of the Department of Revenue of the State of Oregon,	)	
Defendants.	)	

PANNER, J.

Plaintiffs (Carlines) brought this action against defendants Oregon Department of Revenue and its Director, Richard Munn (collectively "the Department"). They sought declaratory and injunctive relief against the Department's assessment and collection of Carlines' Oregon personal property taxes for the tax

year 1988, contending that it discriminated against railroads, in violation of $306 [*sic*] of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act).

I decided the case based on the briefs and stipulated facts, and counsel's statements at closing argument that they had nothing to add to their briefs. On January 22, 1990, I filed an opinion granting judgment for the Department. Carlines move to amend the findings and to make additional findings under Fed.R.Civ.P. 52(b), and to amend the judgment under Fed.R.Civ.P. 59(e). I deny Carlines' motion.

DISCUSSION

The background and applicable law are set forth in my opinion of January 22, 1990, and do not warrant repetition. Carlines ask for a number of modifications, reversals and clarifications to my findings and conclusions. Before addressing each in turn, I have four general comments.

First, Carlines motion implies that because the parties agree to facts, that I must agree to inferences drawn from those facts, and how the law applies. I disagree. This case hinges on a determination of how certain agreed numbers should be classified within the meaning of a statute. In their stipulations, the parties made it clear that while they agreed to the calculations of the figures, they did not agree as to the classifications. If the parties agreed to the exact meaning of those classifications and how the law applies to them, there would be no case.

Second, Carlines mischaracterize certain of my findings so seriously that they can hardly claim error or innocence. They contend that I find standing timber to be personal property subject to ad valorem taxation, which directly contradicts the parties' stipulations. On page 4, line 1 of my opinion, I state that standing timber is real property under Oregon law. I find nothing

in my opinion that says standing timber is subject to ad valorem taxation. What I did say is that standing timber if "taxed under an elaborate plan", and that just because it is taxed at harvest, rather than while standing, does not mean it is not taxed. Opinion at 14, lines 15–19.

Third, Carlines frame their motion to reconsider as though I had not understood what they said the first time, or I concluded their position lacked merit. What I did say was they failed to meet their burden of proof to show impermissible discrimination. Perhaps stating it a different way will satisfy Carlines' craving for clarity. I was unpersuaded on the facts or the law that Carlines had shown impermissible discrimination by a preponderance of the evidence. I remain unpersuaded.

Fourth, although framed as specific disputes with my findings and conclusion, Carlines' motion is nothing more than another stab at getting me to adopt their conceptual approach to this case. Again, I do not.

This case requires me to consider two extremes. On one hand, perhaps the ideal world for Carlines, the Department could be prohibited from exempting any personal property from property taxes, (except presumably Carlines'), at the risk of violating the 4R Act. In their world, a state could not structure its tax policy to recognize significant economic and physical differences between types of property. For example, there are differences between business inventories, which are regularly liquidated and can move from state to state, standing timber, which is attached to real property for long periods, during which it produces no cash flow, and becomes personal property when harvested, and railroad cars leased to railroads, which have none of those characteristics.

At the other extreme, perhaps the ideal world for the Department, a state would be completely unfettered in designing its property tax policy, at no risk of violating the 4R Act. In this world, a property tax could be very simple: 1) there is a property tax on all personal property in the state of Oregon, except as specifically exempted; 2) all property is exempted except that owned by railroads (or presumably Carlines.) More significant than the practical absurdity at either extreme, is that the legislative history of $306 [*sic*] makes it clear that Congress wanted to avoid both and balance the interests of the states and the railroads. For that reason, I see my role as determining whether the Oregon property tax system satisfies the intent of that compromise. It is Carlines' burden to show that it does not. They have not done that.

I turn to Carlines specific requests.

I. TO REVERSE THE FINDING THAT STANDING TIMBER IS PART OF THE COMPARISON CLASS OF PROPERTY AGAINST WHICH DISCRIMINATION AGAINST CARLINES SHOULD BE MEASURED

Carlines contend that because the parties stipulated that standing timber is real property, I erred by disregarding the stipulation and using standing timber as part of the class of property against which Carlines' property should be compared.

I disagree. To adopt this argument would be to adopt the approach to deciding the case that Carlines has consistently urged, which I rejected. I did not, and will not now decide precisely what type of property falls into what category because it is unnecessary to do so.

II. TO REVERSE THE FINDING THAT STANDING TIMBER IS SUBJECT TO AD VALOREM TAXATION

As explained above, I did not find, either implicitly or explicitly that standing timber is subject to ad valorem taxation.

III. TO MODIFY THE FINDING THAT NO MORE THAN 38.2% OF PERSONAL PROPERTY IS EXEMPT FROM PERSONAL PROPERTY TAXATION RATHER THAN 67%

See, generally, my January 22, 1990 opinion.

IV. TO REVERSE THE FINDING THAT CARLINES FAILED TO SHOW ITS PERSONAL PROPERTY WAS VALUED AT FULL CASH VALUE FOR PERSONAL PROPERTY TAXATION PURPOSES

Oregon law requires that all personal property be assessed at its full cash value for personal property taxation purposes. ORS 308.250. "Full cash value" is in contrast to any percent less than 100%. Naturally the parties stipulated that Carlines property was assessed at full cash value — the law so requires. This does not mean that when the assessor values the property, the figure is the actual market value of the property. It means that when the assessor reaches a decision about the full cash value, that value is the figure on which the taxes are calculated.

There is no inconsistency between the stipulation that Carlines' property is assessed at full cash value, and my finding that Carlines had made no showing that any undervaluation discriminates against them or that their property is not undervalued along with everyone else's. *See*, Opinion at 13, n.4. If an assessor assessed every other piece of personal property in Oregon except Carlines' at less than its market value, a case of discriminatory undervaluation might be made. It was not.

V. TO CORRECT THE STATEMENT THAT CARLINES' CLAIM RESTED ON THE ARGUMENT THAT STANDING TIMBER IS EXEMPT FROM AD VALOREM TAXATION

My opinion does say "Carlines' claim rests in large part on the argument that Department violates §306(d) [*sic*] by exempting standing timber from property taxes." Opinion at 13, lines

13-15. I confess to less than complete clarity. I did not mean to suggest that Carlines' expressly made this argument. What I meant to say was that under my view of the case, Carlines could not prevail unless standing timber is viewed as exempt from taxation.

VI. TO CLARIFY WHETHER THE COMPARISON CLASS INCLUDES OR EXCLUDES MOTOR VEHICLES

I did not, and do not now decide whether the comparison class includes or excludes motor vehicles because it is not necessary to do so. *See* Opinion at 13-14.

VII. TO GRANT THE RELIEF CARLINES ORIGINALLY SOUGHT, BASED ON THE FOREGOING MODIFICATIONS, CORRECTIONS AND CLARIFICATIONS

No. *See, generally*, the foregoing.

CONCLUSION

I deny Carlines' motion (#50).

DATED this 20 day of April, 1990.

[Signature omitted in printing]

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OPINION OF THE NINTH CIRCUIT COURT OF APPEALS

[Opinion set forth in full as Appendix A, pages App-1 to App-19 of the printed petition for certiorari]

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OPINION OF THE UNITED STATES DISTRICT COURT

[Opinion set forth in full as Appendix B, pages App-21 to App-33 of the printed petition for certiorari]